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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

AMBASSADOR MARC GINSBERG and COALITION FOR A SAFER WEB, Plaintiffs, v. GOOGLE LLC, Defendant.	CASE NO.: 5:21-CV-00570-BLF **GOOGLE LLC'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** Date: December 16, 2021 Time: 9:00AM Place: Courtroom 3, 5th Floor Before: Judge Beth Labson Freeman

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on December 16, 2021 at 9:00AM, in the United States District Courthouse, Courtroom 3, 5th Floor, 280 South 1st Street, San Jose, CA 95113, before the Honorable Beth Labson Freeman, Defendant Google LLC ("Defendant" or "Google") will, and hereby does, move this Court pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing with prejudice the First Amended Complaint brought by Plaintiffs Marc Ginsberg ("Ginsberg") and the Coalition for a Safer Web ("CSW").

The motion is based upon this Notice of Motion and Motion; the Memorandum of Points and Authorities in support thereof; the Proposed Order filed concurrently herewith; the pleadings, records, and papers on file in this action; oral argument of counsel; and any other matters properly before the Court.

STATEMENT OF REQUESTED RELIEF

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and 47 U.S.C. § 230(c), Google requests that the Court dismiss with prejudice Plaintiffs' claims for violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, and negligent infliction of emotional distress.

STATEMENT OF ISSUES

1. Whether Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c)(1), bars Plaintiffs' claims.

2. Whether Plaintiffs' First Amended Complaint should otherwise be dismissed under Rule 12(b)(6) for failure to state a claim.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs Ambassador Marc Ginsberg and the organization he founded, the Coalition for a Safer Web, assert that several of Telegram's 500 million third-party users have used Telegram to send messages that contain hateful rhetoric or promote extremism. Plaintiffs have apparently not made any effort to pursue claims against Telegram or its users. Instead, Plaintiffs seek to hold Google liable based on its role as the operator of Google Play, an online platform where users can download applications, including Telegram. Plaintiffs do not allege that Google played any role

in creating, contributing to, or moderating content on Telegram. Plaintiffs nevertheless assert that Google should have removed the Telegram app from Google Play, and that it violated California's Unfair Competition Law ("UCL") and negligently inflicted emotional distress on Plaintiffs by failing to do so. While Plaintiffs' goals of combating anti-Semitism and hate speech are laudable, they have chosen the wrong target for their lawsuit.

As an initial matter, Plaintiffs' claims run directly into Section 230 of the Communications Decency Act ("Section 230"). Section 230 "[was] enacted to protect websites against the evil of liability for failure to remove offensive content." *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc). That is precisely what Plaintiffs seek to do here. Their claims all turn on Google's failure to remove the Telegram app from Google Play. This Court recently dismissed an analogous case under Section 230, finding that "Google cannot be held liable for merely allowing [app] developers to provide apps to users through the Google Play Store, as 'providing third parties with neutral tools to create web content is considered to be squarely within the protections of § 230.'" *Coffee v. Google, LLC*, 2021 WL 493387, at *8 (N.D. Cal. Feb. 10, 2021) (Freeman, J.) (citation omitted). The same result is required here.

Even apart from Section 230, however, Plaintiffs' Amended Complaint still fails to state a claim. *First*, Plaintiffs' UCL claim fails for lack of standing. Such a claim requires economic injury, specifically "lost money or property," resulting from the alleged misconduct. *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 325-26 (2011). But Plaintiffs have alleged no such injury: Ginsberg asserts that his phone lost value but cannot explain how Telegram's mere availability on Google Play could have caused that loss in value. Indeed, Ginsberg does not even allege that he downloaded Telegram from Google Play or ever used the app on his phone.

Second, Plaintiffs' claim for negligent infliction of emotional distress ("NIED") fails because, under established Ninth Circuit law, online platforms like Google Play do not owe a duty of care to users. *See Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1100-01 (9th Cir. 2019). Plaintiffs also have not alleged proximate causation: the Amended Complaint does nothing to plausibly tie the fear Ginsberg claims to have felt as a result of content on Telegram to

Google's decision to host the app on Google Play.

Whether under Section 230 or on their own terms (or both), therefore, Plaintiffs' claims should be dismissed. And Plaintiffs should not receive another opportunity to amend. Plaintiffs amended their complaint in response to Google's first motion to dismiss, but the changes were superficial: they did not address Section 230 at all or offer any new facts that make any difference on the merits of their claims. *See* Ex. 1 (comparison showing amendments in First Amended Complaint ("FAC") relative to original complaint). In short, Plaintiffs failed to address the deficiencies that Google outlined both in its initial motion to dismiss and in a letter that Google sent to Plaintiffs nearly a month before filing its motion that previewed Google's defenses. Ex. 2 (03/26/2021 Letter from L. White to K. Altman). In light of all that, it is fair to understand the current version of the complaint as Plaintiffs' best articulation of their claims. Dismissal therefore should be with prejudice.

FACTUAL & PROCEDURAL BACKGROUND

Google is a provider of interactive computer services, including its search engine and Google Play. ¶ 10. (Citations to "¶ _" are to the corrected FAC. ECF No. 19.) Google Play is an online platform and marketplace from which users can download a wide variety of apps to their mobile devices. *Id.* Before being included on Google Play, apps must undergo a review process, must agree to Google's established terms of use, and must comply with Google's policies and guidelines. ¶¶ 25-27. Google has "full managerial discretion to remove apps that violate [its] guidelines." ¶ 95.

One of the apps that is available for download in Google Play is Telegram, a popular third-party messaging app. ¶ 30. The app allows users to exchange messages and other content, and uses encryption to protect the privacy of user communications. ¶¶ 30-36. Telegram maintains policies for regulating content or activity on its platform and may remove content that violates its policies. ¶¶ 37-40. The FAC identifies various examples of user content allegedly disseminated through Telegram that Plaintiffs describe as reflecting hate speech, racism, anti-Semitism, or incitement of violence. ¶¶ 51-71.

Plaintiff Ginsberg created the Coalition for a Safer Web "to compel social media platforms to end their tolerance of anti-Semitism and their enabling of extremist groups to operate with impunity over social media." ¶ 8. He allegedly owns a Samsung Galaxy Express smartphone running the Android operating system for personal and professional use. ¶ 4. While Android devices can download apps from Google Play, Ginsberg does not allege that he ever downloaded the Telegram app to his smartphone (whether via Google Play or through some other means)—or that he ever accessed Telegram, whether through a web browser or through the app. Nor does he allege that he actually viewed the user content described in the FAC.

Based on these allegations, Plaintiffs assert two claims against Google, one arising under the unlawful and unfair prongs of the UCL and the other for negligent infliction of emotional distress. To support the emotional distress claim, Ginsberg notes that he "is a Jewish person whose professional work requires him to maintain a presence in the public eye." ¶ 81. According to the FAC, the anti-Semitic and other objectionable content on Telegram has caused him to "live in apprehension of religiously motivated violence being perpetrated against him," which has in turn "caused him substantial emotional harm, including depression and anxiety." ¶¶ 83-84. Plaintiffs further assert that Ginsberg "is aware that Telegram is used to incite violence and was terrified for his safety during the Capitol riots of January 2021." ¶ 82.

In addition, Ginsberg claims to have suffered damages "through his purchase of his Samsung [phone]" or from "being deprived of a key benefit of the purchase and use of" his phone. ¶¶ 13, 107. In his words, "[a] portion of the cost of the Samsung Galaxy Express was related to the benefits provided under the terms of service and policies of Google." ¶ 103. While Plaintiff CSW is allegedly responsible for reimbursing Ginsberg for his professional use of his Samsung Galaxy Express (¶ 9), the FAC does not suggest that CSW was in any way affected by any content allegedly disseminated on Telegram. At the heart of Plaintiffs' claims is the assertion that Google should have removed the Telegram app from Google Play as a means of "compel[ling] Telegram to improve its content moderation policies." ¶ 49. To that end, Plaintiffs seek to enjoin Google from making Telegram available on Google Play. FAC, Prayer for Relief.

Around the same time that Plaintiffs sued Google, they filed a nearly identical complaint against Apple. Compl., *Ginsberg v. Apple, Inc.*, No. 5:21-cv-00425-EJD (Jan. 17, 2021). There, Ginsberg claims to own an Apple iPhone and complains about Telegram's presence on Apple's App Store. *Id.* ¶¶ 4, 28. The factual allegations and causes of action against Apple are otherwise a close copy of those Plaintiffs assert against Google. There is no indication that Plaintiffs have brought any claims directly against Telegram or any of the users who created the content described in the FAC.

Google filed a motion to dismiss the original complaint on April 22, 2021. ECF No. 14. Instead of opposing the motion to dismiss, Plaintiffs filed an amended complaint with minimal changes on June 8, 2021. ECF No. 17; *see* Ex. 1. Plaintiffs filed a corrected amended complaint on June 11, 2021 that changed the named party from "Google, Inc.," which was incorrect, to "Google LLC." ECF No. 19.

ARGUMENT

To survive a motion under Rule 12(b)(6), "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, Plaintiffs must allege "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The Court is not required to "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Prager Univ. v. Google LLC*, 2018 WL 1471939, at *3 (N.D. Cal. Mar. 26, 2018), *aff'd*, 951 F.3d 991 (9th Cir. 2020) (quoting *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011)).

I. SECTION 230 BARS PLAINTIFFS' STATE LAW CLAIMS

Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). This provision "protects websites from liability under state or local law for material posted on their websites by someone else." *Dyroff*, 934 F.3d at 1097 (quoting *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016)). In enacting this provision, Congress recognized that "[m]aking interactive computer services and their users liable

for the speech of third parties would severely restrict the information available on the Internet." *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003).

Courts have applied this provision "'to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" *Coffee*, 2021 WL 493387 at *4 (quoting *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007)). As this Court has explained, "the immunity extends to *all* claims stemming from an interactive computer service provider's publication of content created by third parties." *Id*. at *4. And because Section 230 is meant to protect "not merely from ultimate liability, but from having to fight costly and protracted legal battles," *Roommates*, 521 F.3d at 1175, it is well settled that Section 230(c)(1) is a proper basis for dismissing claims under Rule 12(b)(6). *See, e.g.*, *Coffee*, 2021 WL 493387 at *8 (granting motion to dismiss under Section 230(c)(1)); *see also Kimzey v. Yelp! Inc*., 836 F.3d 1263, 1266 (9th Cir. 2016) (affirming grant of motion to dismiss under Section 230(c)(1)); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (explaining that dismissal under Section 230 is proper when "the statute's barrier to suit is evident from the face of the complaint").

A. Plaintiffs Seek to Treat Google as a Publisher of Information Provided by Another Information Content Provider

There is an established three-part test for application of Section 230(c)(1). "Immunity from liability exists for '(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.' When a plaintiff cannot allege enough facts to overcome Section 230 immunity, a plaintiff's claims should be dismissed." *Dyroff*, 934 F.3d at 1097 (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009)). All three elements are readily met here.

First, Google is the provider of an interactive computer service. Plaintiffs acknowledge as much in alleging that Google is engaged in the "distribution of applications on the Google Play Store." ¶ 12; *accord Coffee*, 2021 WL 493387, at *5 (finding that Google is an interactive computer service in connection with its operation of Google Play); *Dyroff*, 934 F.3d at 1097

(explaining that "[w]e interpret the term 'interactive computer service' expansively" and that "[w]ebsites are the most common interactive computer services").

Second, Plaintiffs' claims treat Google as the publisher or speaker of the allegedly unlawful content. In determining whether a plaintiff's claims treat an interactive computer service as a publisher, "courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability." *Barnes*, 570 F.3d at 1101-02. As this Court has explained, "[p]ublication includes 'any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.'" *Coffee*, 2021 WL 493387 at *6 (quoting *Roommates*, 521 F.3d at 1170-71); *accord Barnes*, 570 F.3d at 1102 ("[P]ublication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.").

Here, Plaintiffs plainly seek to hold Google liable as a publisher of apps on Google Play (and, indirectly, of the content exchanged through those apps). The essence of Plaintiffs' claims is that Google should have removed (that is, ceased publishing) the Telegram app, or that it should have used the threat of removal to force Telegram to more aggressively monitor or police user messages on its app. ¶¶ 47, 85-88. These claims target "the very essence of publishing"— *i.e.* "making the decision whether to print or retract a given piece of content." *Klayman*, 753 F.3d at 1359; *accord Kimzey*, 836 F.3d at 1268 ("Kimzey's claims are premised on Yelp's publication of Sarah K's statements and star rating. In other words, the claim is directed against Yelp in its capacity as a publisher or speaker."); *Barnes*, 570 F.3d at 1103 ("[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove"); *Bennett v. Google, LLC*, 882 F.3d 1163, 1168 (D.C. Cir. 2018) ("the decision to print or retract is fundamentally a publishing decision for which the CDA provides explicit immunity"); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (Section 230 precludes liability for "decisions relating to the monitoring, screening, and deletion of content") (quoting *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003)).

Third, Plaintiffs' claims are overtly based on information provided by another content provider. Indeed, there are *two* distinct layers of content provided by third parties in this case: the Telegram app itself and the allegedly harmful or offensive speech posted by users of Telegram. *See* ¶¶ 29-42 (describing Telegram's Terms of Service and Moderation policies); ¶¶ 48-70 (describing posts on Telegram). But none of this alleged content—neither the Telegram app itself nor any of the messages exchanged through it—is alleged to have been created or developed by Google. *See, e.g.*, *Dyroff*, 934 F.3d at 1098 ("The third prong is also met because … the content at issue was created and developed by [third parties]"); *Bennett*, 882 F.3d at 1167 ("Bennett alleges that only Pierson—and not Google—created the offensive content on the blog."); *Klayman*, 753 F.3d at 1358 ("[T]he complaint nowhere alleges or even suggests that Facebook provided, created, or developed any portion of the content that Klayman alleges harmed him").

This Court recently applied Section 230 to bar a similar set of claims arising from Google's alleged failure to remove third-party apps from Google Play. *Coffee*, 2021 WL 493387, at *6. The plaintiffs there alleged that Google violated state consumer protection laws by publishing certain video game apps in Google Play. The Court dismissed the claims as a matter of law, explaining that, because plaintiffs "[sought] an order requiring Google to screen apps offered through its Google Play store and exclude those containing [certain content]," they were demanding that Google engage in "conduct that [was] squarely within the role of a publisher." *Id*. So too here: "Google cannot be held liable for merely allowing [] developers to provide apps to users through the Google Play store, as 'providing third parties with neutral tools to create web content is considered to be squarely within the protections of § 230.'" *Id*. at *8.

II. PLAINTIFFS FAIL TO STATE A VIABLE CLAIM FOR RELIEF

Even apart from Section 230, Plaintiffs' causes of action—under the UCL and for NIED—fail to state a viable claim.

A. Plaintiffs Lack the Standing Required to Bring a UCL Claim

Plaintiff's UCL claim is based on the theory that Google's decision not to remove the Telegram app from Google Play somehow amounted to an unlawful or unfair business practice. ¶¶ 90-121. While there is no plausible allegation of illegality or unfairness, this claim fails most

obviously for lack of the economic injury that the UCL requires. "A private person has statutory standing under the UCL only if he or she 'has suffered injury in fact and has ***lost money or property as a result of the unfair competition***.'" *Coffee*, 2021 WL 493387, at *8 (emphasis added) (quoting Cal. Bus. & Prof. Code § 17204); *see also Hawkins v. Kroger Co.*, 906 F.3d 763, 768 (9th Cir. 2018) (citation omitted) ("A plaintiff is required to show 'some form of economic injury' as a result of his transactions with the defendant."); *Birdsong v. Apple, Inc.*, 590 F.3d 955, 960 (9th Cir. 2009) ("[T]o plead a UCL claim, the plaintiffs must show, consistent with Article III, that they suffered a distinct and palpable injury as a result of the alleged unlawful or unfair conduct."). To establish statutory standing, a complaint must allege facts showing both economic injury and causation. *Coffee*, 2021 WL 493387, at *9.

That Plaintiffs may have spent money on Ginsberg's phone is not enough for standing. *See, e.g.*, *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 855 (Cal. Ct. App. 2008) (no economic injury under the UCL where plaintiff merely alleged that he paid for a book and received a book in exchange); *Pet Food Express Ltd. v. Applied Underwriters, Inc.*, 2019 WL 4318584, at *4 (E.D. Cal. Sept. 12, 2019) ("A purchase or transaction where the person paid with money, without more, does not constitute a loss" for UCL standing); *accord Birdsong*, 590 F.3d at 961-62 (no UCL standing even though plaintiffs purchased allegedly defective product from defendant Apple). Instead, Plaintiffs need to plausibly allege that Google's allegedly unlawful or unfair conduct caused Ginsberg to pay for something he did not receive or make a purchase he would otherwise not have made. *Kwikset*, 246 P.3d at 885; *accord Birdsong*, 590 F.3d at 960 (UCL plaintiffs must allege that "they suffered a distinct and palpable injury ***as a result of*** the alleged unlawful or unfair conduct") (emphasis added); *accord Williams v. Apple*, 449 F. Supp. 3d 892, 914 (N.D. Cal. 2020) (finding no UCL standing where plaintiffs failed to show that "in [the] absence [of alleged misrepresentations], [they] in all reasonable probability would not have engaged in the injury-producing conduct") (citation omitted). But the FAC does nothing like that.

To begin, Ginsberg does not suggest that he bought his Samsung Galaxy Express phone from Google—or that he downloaded any app, including Telegram, from Google Play, much less that he paid Google any money to do so. ¶ 4. Ginsberg vaguely refers to the "purchase [of]

Google products" (¶ 106), but the FAC does not identify anything that he actually bought from Google, much less explain the connection of any such purchase to his claims. Nor does CSW, which did nothing other than allegedly agree to "reimburse[]" Ginsberg for his "professional use" of his phone. ¶ 9.

Instead, Plaintiffs' theory of economic injury is the vague suggestion that Ginsberg was somehow "deprived of a key benefit of the purchase and use of the Samsung Galaxy Express," which he bought from a third party. ¶ 107. Plaintiffs claim that "[p]art of the cost associated with Plaintiffs' transaction was related to the benefits promised under Defendant's terms of service and policies. Because Plaintiffs paid for the Samsung Galaxy Express, they have suffered an actual loss of money in not receiving benefits Plaintiffs paid for." ¶ 108. It is not clear what this means, but it does not state a plausible UCL standing theory. The FAC does not suggest that Ginsberg's phone failed to work in any way, or that Ginsberg has been deprived of any expected functionality or feature of the phone. Nor does he allege that he cannot access or use Google Play. Plaintiffs' only objection seems to be that Telegram remains available for download via Google Play, which they view as contrary to Google's content moderation policies. ¶¶ 106-08. Even accepting that for the sake of argument, there is no credible—or even coherent—theory of how the mere presence of the Telegram app in Google Play could have affected the monetary value of a Samsung phone. The fact that a given app is available in Google Play could not possibly make a piece of third-party hardware less valuable than it would have been had the app been removed. Plaintiffs cannot establish a UCL injury by incanting a conclusory allegation of monetary harm that defies logic and common sense. *Cf. Birdsong*, 590 F.3d at 961 ("The plaintiffs' alleged injury in fact is premised on the loss of a 'safety' benefit that was not part of the bargain to begin with.").

That is all the more so given that Plaintiffs do not allege any link between Google's alleged failure to remove the Telegram app and Ginsberg's actual use of either his phone or Google Play. Indeed, Ginsberg does not suggest that he ever even downloaded the app via Google Play (or otherwise), much less that he used his phone to access or view objectionable content on the app. Plaintiffs similarly do not claim that if Google had removed the app from Play, that

would have made it inaccessible through Ginsberg's phone. Nor could they, as Google Play is just one of several ways to download mobile apps for use in the Android operating system. In short, the value of Ginsberg's phone has nothing to do with the Telegram app. And given that, the app's availability through Google Play has no plausible connection, much less a direct causal link, to the economic injury Plaintiffs claim to have suffered.

In *Coffee*, this Court dispatched a similarly baseless UCL claim. There, the plaintiffs allegedly purchased virtual currency while playing games downloaded from Google Play. *Coffee*, 2021 WL 493387, at *9. They alleged that Google should have removed those apps from Play under its content-moderation policies. The Court found no economic injury: "Plaintiffs do not explain how their purchases of virtual currency resulted in economic loss. . . . Nor do Plaintiffs allege . . . 'that they were deprived of an agreed-upon benefit in purchasing' the virtual currency . . . . 'If one gets the benefit of his bargain, he has no standing under the UCL.'" *Id.* (citations omitted). This case is even easier. The plaintiffs in *Coffee* actually paid money to Google, which they spent in connection with the allegedly unlawful apps that they downloaded through Google Play. Here, Plaintiffs purchased nothing from Google—and they do not even claim to have downloaded or used the Telegram app, much less spent money to do so. There is nothing resembling monetary injury here. *See, e.g.*, *Hall*, 158 Cal. App. 4th at 857 (affirming dismissal of UCL claim where plaintiff "did not allege [defendant's] acts of alleged unfair competition caused him to lose money or property"); *Backhaut v. Apple., Inc.*, 74 F. Supp. 3d 1033, 1048 (N.D. Cal. 2014) (no UCL injury where plaintiffs failed to allege that "Apple's actions affect[ed] the actual functionality of their Android devices" or that they "overpaid for their Apple devices in reliance on misrepresentations, omissions, or other wrongful conduct by Apple").

B. Plaintiffs Have No Viable Claim for Negligent Infliction of Emotional Distress

Plaintiffs also fail to state a viable claim for negligent infliction of emotional distress. Under California law, "[n]egligent infliction of emotional distress is not an independent tort; it is the tort of negligence to which the traditional elements of duty, breach of duty, causation, and damages apply." *Ess v. Eskaton Props.*, 97 Cal. App. 4th 120, 126 (Cal. App. 2002); *accord Huggins v. Longs Drug Stores Cal., Inc.*, 6 Cal. 4th 124, 129 (Cal. 1993). Specifically, "[a] prima

facie case of negligent infliction of emotional distress requires: (1) duty; (2) breach; (3) severe emotional distress; [and] (4) actual and proximate cause.'" *Wanetick v. Mel's of Modesto, Inc.*, 811 F. Supp 1402, 1408 (N.D. Cal. 1992) (citing *Carney v. Rotkin, Schmerin and McIntyre*, 206 Cal. App. 3d 1513, 1524 (1988)). Here, Plaintiffs fail to allege either an applicable duty or proximate causation.[1]

1. Plaintiffs Fail to Allege An Applicable Duty

A claim for negligent infliction of emotional distress often turns on the "determination of the duty issue," which is a question of law. *Ess*, 97 Cal. App. 4th at 126. Plaintiffs devote a single boilerplate allegation to the question of duty: "Because Ambassador Ginsberg purchased [the Samsung Galaxy Express phone], Google owes a duty of reasonable care to ensure that their [sic] services are not used as a means to inflict religious and racial intimidation."[2] ¶ 73. This conclusory allegation fails as a matter of law. The California Supreme Court has expressly rejected the existence of a general duty of reasonable care to prevent emotional distress. *See Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 984 (1993) ("[T]here is no duty to avoid negligently causing emotional distress to another, and . . . damages for emotional distress are recoverable only if the defendant has breached some other duty to the plaintiff.").

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[1] The lack of duty and proximate causation are the most obvious defects in Plaintiffs' claim for negligent infliction of emotional distress. In addition, they have equally failed to state each of the other elements. Plaintiffs cite no harm or emotional distress caused to CSW as an organization, and so the claim fails as to CSW for that additional reason. The FAC adds no allegations that could possibly establish emotional distress on behalf of an organization. Given Section 230 and Plaintiffs' obvious failure to allege a duty of care or proximate causation, the Court need not reach these other issues to dispose of Plaintiffs' claim.

[2] The FAC reads in relevant part: "Because Ambassador Ginsberg purchased ***Apple's iPhone***, Google owes a duty of reasonable care to ensure that their services are not used as a means to inflict religious and racial intimidation." ¶ 73 (emphasis added). This appears to be an erroneous copying of the corresponding allegation in Plaintiffs' nearly identical complaint against Apple.

Nor has Plaintiff identified a specific legal duty on which to base his negligence claim. To the extent that Plaintiff tries to assign Google a duty of care as the operator of Google Play, such a claim would fail as a matter of law. In *Dyroff*, the Ninth Circuit expressly held that a website providing a forum for users to post and receive material did not owe its users a duty of care. 934 F.3d at 1100-01. That case arose after a website's notification to one user about another user's heroin-related post allegedly led to an illegal drug transaction and the death of one of the users from a drug overdose. *Id.* at 1095. The Court of Appeals explained that "[n]o website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content" and expressly "decline[d] to create such a relationship." 934 F.3d at 1101; *see also Doe No. 14 v. Internet Brands, Inc.*, 2016 U.S. Dist. LEXIS 192144, at *14 (C.D. Cal. Nov. 14, 2016) (concluding that the website operator owed no duty to warn members of the website). Just so here: Plaintiffs cannot allege a duty on Google's part merely based on its operation of a platform that makes third-party apps available for download.

Dyroff forecloses Plaintiffs' negligence claim. Indeed, Plaintiffs' threadbare allegation of duty is even weaker than the one rejected in *Dyroff* because the alleged relationship between Plaintiffs and Google is even more attenuated. Whereas the user in *Dyroff* actually used and posted to the website at issue, Plaintiffs here do not claim that they ever downloaded Telegram from Google Play or viewed content on Telegram, much less that Google did anything to bring the app or its content to their attention. All Google is alleged to have done is provide "content-neutral functions"—namely, making a broad array of apps available on Google Play, including Telegram. *Dyroff*, 934 F.3d at 1100.

Because Plaintiffs fail to allege a relevant duty of care, the negligent infliction of emotional distress claim fails as a matter of law. *See, e.g.*, *Carter v. Rasier-CA, LLC*, 2017 WL 4098858, at *5 (N.D. Cal. Sept. 15, 2017), *aff'd*, 724 F. App'x 586 (9th Cir. 2018) (dismissing claim for negligent infliction of emotional distress based on lack of duty of care); *Clark v. Cty. of Tulare*, 755 F. Supp. 2d 1075, 1092 (E.D. Cal. 2010) (same); *see also Beckman v. Match.com, LLC*, 2017 WL 1304288, at *3 (D. Nev. Mar. 10, 2017), *aff'd*, 743 F. App'x 142 (9th Cir. 2018) (dismissing negligence claim and finding that Match.com had no duty to warn of dangers on the

website, because there was no "special relationship" between the website and its users); *accord Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 598 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir. 2019) (dismissing negligent misrepresentation claim against Grindr app on a similar basis).

2. Plaintiffs Fail to Allege Proximate Causation

Even apart from the lack of a duty, Plaintiffs have no viable allegation of proximate causation. Plaintiff does not allege that Google was responsible for any of the third-party content posted on Telegram that distressed him. Instead, the allegations are all about third-party content on a third-party app that was available for download in Google Play. The FAC asserts in conclusory terms that Google's decision to keep Telegram on the Play Store caused Ginsberg to suffer emotional distress, including alleged "fear of religious violence" based on content found on Telegram. ¶¶ 84, 88. But this purported "injury . . . is too attenuated from Defendants' alleged conduct to meet the proximate causation requirement." *Wanetick*, 811 F. Supp at 1408 (dismissing claim for negligent infliction of emotional distress). As explained above in connection with Plaintiffs' UCL claim (*supra*, pp. 8-11), Plaintiffs fail to draw any connection between Telegram's presence on Google Play and Ginsberg's alleged injury. Ginsberg does not claim that he ever downloaded the Telegram app from Google Play or even used the app to view the third-party content that caused him distress. In short, insofar as Ginsberg allegedly suffered emotional distress from the content that was available on Telegram, that distress had nothing to do with Google's choices about whether the app would be available for download in Google Play.

Apart from that, the FAC does not—and could not—suggest that Google's decision about the Telegram app would have changed the nature of the user-generated content appearing on the app or Ginsberg's exposure to such content. *See* ¶ 30. Even if Google had removed Telegram from Play, all of the content that allegedly caused Ginsberg emotional distress would still have been accessible through the app and could have been accessed by Ginsberg or third parties in other ways (for instance, downloading onto a desktop computer or downloading the app from a different app platform or website). For this reason as well, Google's alleged failure to remove the app from Play bore no causal connection to Ginsberg's purported emotional distress. Without a

basis for asserting either a duty of care or proximate causation, Plaintiffs cannot allege that Google negligently inflicted emotional distress on Ginsberg.

III. PLAINTIFFS SHOULD NOT BE GIVEN FURTHER LEAVE TO AMEND

Plaintiffs' FAC—filed after Google first previewed its arguments in a letter to Plaintiffs and *after* it moved to dismiss the original Complaint—added only a handful of token allegations. *See* Ex. 1 (comparison showing amendments in First Amended Complaint ("FAC") relative to original complaint). Despite being fully aware of Google's arguments, Plaintiff's amendments did nothing to address Section 230, much less to offer new facts that might provide a basis for escaping that immunity. Nor do the amendments change the fact that Plaintiffs have no remotely plausible theory of economic loss or causation sufficient for UCL standing and that, as a matter of law, Google owed no legal duty to Plaintiffs. The FAC thus represents Plaintiffs' best effort to state a case, and they apparently have nothing more to add. Any further amendment would be futile. For all these reasons, and given that Section 230 protects "not merely from ultimate liability, but from having to fight costly and protracted legal battles," the Court should not give Plaintiffs further leave to amend. *Roommates*, 521 F.3d at 1175.

CONCLUSION

Plaintiffs' FAC should be dismissed with prejudice.

Respectfully submitted

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